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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91218118
Party	Plaintiff SUCCESS Partners Holding Co.
Correspondence Address	GEORGE R SCHULTZ SCHULTZ & ASSOCIATES PC 5400 LBJ FREEWAY, STE 1200 DALLAS, TX 75240 UNITED STATES rschultz@grspc.com, nmarsh@grspc.com, docket@grspc.com, kneedham@grspc.com
Submission	Other Motions/Papers
Filer's Name	George R. Schultz
Filer's e-mail	rschultz@grspc.com, nmarsh@grspc.com, docket@grspc.com, kneedham@grspc.com
Signature	/george r. schultz/
Date	09/30/2015
Attachments	Response to Request to Extend Suspension Period 093015.pdf(252898 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**In the matter of Trademark  
Application Serial No.: 85/623,028**

**For the mark: SWEET SUCCESS & design**

**Published in the Official Gazette on: April 29, 2014**

**SUCCESS PARTNERS HOLDING CO.**

**Opposer,**

**v.**

**OPPOSITION NO. 91218118**

**ELEANOR ANNE SWEET  
d/b/a THE REMINGTON GROUP, LLC**

**Applicant.**

**RESPONSE TO REQUEST TO EXTEND SUSPENSION PERIOD**

Opposer SUCCESS Partners Holding Co. files this response to Applicant's request to extend the suspension period for expert discovery by thirty (30) days and would respectfully show the Board the following.

**I. BACKGROUND**

On August 27, 2014, Opposer filed its Notice of Opposition [No. 1].

On June 8, 2015, Opposer served its expert disclosure and filed its Notification of Expert Designation [No. 8].

On June 17, 2015, Opposer filed a Motion for Extension of Answer or Discovery or Trial Periods With Consent [No. 9] to extend the close of discovery by thirty (30) days. The Motion was granted on June 17, 2015. The Board reset the deadline for expert disclosures to July 6, 2015.

As of July 6, 2015, Applicant had served no disclosure of expert witnesses.

On July 13, 2015, the Board suspended the proceeding for sixty (60) days, until September 11, 2015, in order to complete expert discovery.

On September 10, 2015, Applicant filed a letter with the Board requesting that the suspension period be extended by thirty (30) days.

On September 12, 2015, more than two (2) months after the deadline, Applicant served an expert designation designating herself as an “expert.”

The request for an extension should be denied because Applicant has shown neither good cause nor excusable neglect.

## **II. ARGUMENT AND AUTHORITIES**

### **A. Legal Standard for an Extension of Time**

The Board will only grant an extension of time for good cause.<sup>1</sup> A motion to extend must set forth with particularity the facts said to constitute good cause for the requested extension.<sup>2</sup> A party that moves to extend time must also demonstrate that the requested extension is not necessitated by the party’s own lack of diligence or unreasonable delay.<sup>3</sup>

If the deadline has passed before the motion for extension is filed, a party must also establish that it failed to act because of excusable neglect.<sup>4</sup> Excusable neglect is determined by considering four factors:

1. the danger of prejudice to the nonmovant;
2. the length of the delay and its potential impact on judicial proceedings;
3. the reason for the delay, including whether it was within the reasonable control of the movant; and

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<sup>1</sup> See, Fed. R. Civ. P. 6(b) and TBMP § 509.01(a).

<sup>2</sup> See, *SFW Licensing Corp. v. Di Pardo Packing Ltd.*, 60 USPQ2d 1372, 1373 (TTAB 2001).

<sup>3</sup> See, *National Football League v. DNH Management LLC*, 85 USPQ2d 1852, 1854 (TTAB 2008).

<sup>4</sup> See, Fed. R. Civ. P. 6(b)(1)(B).

4. whether the movant acted in good faith.<sup>5</sup>

The most important factor is the third factor.<sup>6</sup>

**B. Applicant has Requested Two Extensions of Time.**

The request by Applicant is, in effect, a request to extend two separate deadlines, namely:

1. the deadline to conduct discovery of designated experts of Opposer (the suspension period); and,
2. the deadline for Applicant to designate experts and rebuttal experts.

**C. Applicant has Not Demonstrated Excusable Neglect nor Good Cause to Reopen Expert Designations.**

The deadline for Applicant to designate experts for her case in chief was July 6, 2015.

The deadline for Applicant to designate rebuttal experts was July 8, 2015.<sup>7</sup> Both of these deadlines are past. Applicant served no expert designations by either deadline.

In order to reopen expert designations, Applicant must establish both *good cause and excusable neglect*. Applicant has shown neither.

1. No excusable neglect.

Applicant gives two reasons why she should be allowed to reopen expert designations.

The reasons are:

1. that she works during the day and one night a week; and,
2. that she can only talk to the potential experts on nights and weekends.<sup>8</sup>

These reasons are insufficient to satisfy the four factor test for excusable neglect.

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<sup>5</sup> See, *Luster Products, Inc. v. Van Zandt*, Opp. No. 91202788, \*4 (TTAB Nov. 28, 2012), citing *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 507 U.S. 380, 395 (1993).

<sup>6</sup> See, *Luster Products, Inc.*, Opp. No. 91202788 at \*4.

<sup>7</sup> Opposer filed its designation of expert on June 8, 2015. Therefore, Applicant had thirty (30) days, or until July 8, 2015, to serve her rebuttal designation of experts under Fed. R. Civ. P. 26(a)(2)(D)(ii).

<sup>8</sup> See, Correspondence from Applicant filed on September 10, 2015 [No. 18], paragraphs 2 and 3.

The first factor of potential prejudice and second factor of judicial delay do not favor a finding of excusable neglect. The late designation of experts would require Opposer to move to extend the discovery period in order for Opposer to conduct discovery of the late designated experts and also possibly designate rebuttal experts. If the motion is granted, then the proceedings would be extended by at least several months, if not more. If the motion is not granted, then Opposer would be unable to conduct discovery of any designated experts before the close of discovery which would, in turn, impair the ability of Opposer to prepare for trial. Hence, reopening designation of experts will either extend the proceedings by months, or prejudice the ability of Opposer to prepare its case. These first and second factors do not support a finding of excusable neglect.

The third, and most important, factor is the reason for the delay. This factor clearly does not support a finding of excusable neglect. Applicant knew of the deadline to designate experts for her case in chief since September 24, 2014.<sup>9</sup> The deadline for her to designate rebuttal experts is clearly set out in the Federal Rules.<sup>10</sup> Despite these clear deadlines, Applicant tells the Board that she cannot comply because she is too busy. The fact that Applicant is busy is not excusable neglect. When and how often Applicant confers with her expert witnesses was (and is) completely within her control and so cannot rise to the level of excusable neglect.<sup>11</sup> Moreover, Applicant's failure to discuss the case with her experts until one year *after* the scheduling order and *after* an agreed extension of time has passed is unreasonable given the

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<sup>9</sup> The original deadline was set out in the Board's order of September 24, 2014. Applicant's deadline to designate experts for her case in chief was also extended by thirty (30) days by consent of the parties. *See*, Motion for Extension of Answer or Discovery or Trial Periods with Consent [No. 9].

<sup>10</sup> *See*, Fed. R. Civ. P. 26(a)(2)(D)(ii). *See also*, *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 824 (9th Cir. 1996), *citing Pioneer Investment Services Co.*, 507 U.S. at 392. (Lack of familiarity with or ignorance of the Federal Rules does not constitute excusable neglect.)

<sup>11</sup> *See*, *U.S. v. Dumas*, 94 F.3d 286, 289 (7th Cir. 1996) ("'Excusable neglect' requires something more than a simple failure to meet the deadline due to a busy schedule."); *see also*, *Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1048 (8th Cir. 2010) ("Hawks's assertion in his motion that his counsel was occupied with other hearings does not constitute excusable neglect.")

length of time that has passed. The reasons provided by Applicant simply do not support reopening expert designations.

The fourth factor requires Applicant to make a showing of good faith. Applicant has not made this showing because she has failed to diligently pursue discovery of Opposer's expert or Applicant's experts. She has had many months to prepare and already had one extension. Even so, two (2) months after the latest deadline, Applicant admits that she has not even discussed the case with her experts. The reasons provided simply do not show good faith.

Under the factors, Applicant has failed to establish excusable neglect in order reopen expert designations, and so her request should be denied.

2. No good cause.

Applicant also must show good cause to reopen expert designations. For example, Applicant must identify with particularity the facts that constitute the good cause for the extension. But here, Applicant failed to identify sufficient facts to establish good cause for her failure to request an extension of time until long after the deadlines had passed. Instead, Applicant merely tells the Board that she works during the day and so has scheduling problems. These reasons are insufficient because Applicant has had over a year to schedule the time to talk to her experts, she merely has neglected to do so.

**D. Applicant has Not Established Good Cause to Extend the Suspension Period.**

Applicant has not provided good cause as to why the suspension period for expert discovery should be extended. The suspension was intended to allow the parties to conduct discovery of timely designated experts. Applicant has not adequately explained why she has not been able to complete discovery of the designated expert of Opposer. Moreover, Applicant has failed to even request discovery of Opposer's expert witness. Further, Applicant has not

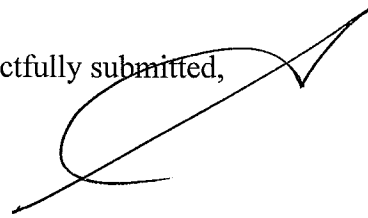
provided any reasons that demonstrate that the extension is needed other than her own lack of diligence and unreasonable delay. Applicant has failed to meet her burden to establish good cause why the suspension should be extended, therefore, the request should be denied.

### **III. CONCLUSION**

Applicant has requested to reopen expert designations and extend the suspension period for expert discovery. Yet, Applicant has failed to show excusable neglect or show good cause. The request should be denied to avoid prejudice to Opposer and so that the proceeding may move forward to an orderly disposition.

Dated: September 30, 2015.

Respectfully submitted,



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George R. Schultz  
Texas State Bar No. 17837500  
[rschultz@grspc.com](mailto:rschultz@grspc.com)  
Nicole R. Marsh  
Texas State Bar No. 24044653  
[nmarsh@grspc.com](mailto:nmarsh@grspc.com)

SCHULTZ & ASSOCIATES, P.C.  
5400 LBJ Freeway  
Suite 1200  
Dallas, Texas 75240  
(214) 210-5940 telephone  
(214) 210-5941 facsimile


ATTORNEYS FOR OPPOSER  
SUCCESS PARTNERS HOLDING CO.

**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing Response to Request to Extend Suspension  
Period was served upon the persons listed below in the manner indicated on September 30, 2015.

Ms. Eleanor Anne Sweet  
d/b/a The Remington Group, LLC  
196 Beachview Lane  
Barrington, Illinois 60010-2101

***Via First Class Mail, Postage Prepaid***

A handwritten signature in black ink, appearing to be 'G. Schultz', written over a horizontal line.

George R. Schultz